Supreme Court, U.S.
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No. 01-1545

IN THE

Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO, ET AL.,
Petitioners,

v.

ARECIBO COMMUNITY HEALTH CARE, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Congress exceed its constitutional authority in providing, in Section 106(b) of the Bankruptcy Code, that a State that voluntarily chooses to invoke the jurisdiction of a federal court by filing a proof of claim in a bankruptcy case thereby waives its sovereign immunity with respect to compulsory counterclaims?

CORPORATE DISCLOSURE STATEMENT

Respondent Carlos E. Rodríguez-Quesada is the Chapter 7 Trustee appointed in the bankruptcy case filed by Arecibo Community Health Care, Inc. Pursuant to Rule 29.6, Respondent states that Arecibo Community Health Care, Inc. has no parent corporation, and no publicly held company owns 10% or more of Arecibo Community Health Care, Inc.'s stock.

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ARECIBO COMMUNITY HEALTH CARE, INC., ET AL.,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

Respondent Carlos E. Rodríguez-Quesada, Chapter 7 Trustee of Arecibo Community Health Care, Inc., hereby opposes the petition for writ of certiorari, which seeks review of the First Circuit's opinion on rehearing. This case presents a challenge to the constitutionality of Section 106(b) of the Bankruptcy Code, which provides that when a governmental unit voluntarily invokes the jurisdiction of the federal courts by filing a proof of claim in a bankruptcy case, it waives its sovereign immunity as to compulsory counterclaims. *See* 11 U.S.C. § 106(b).[1] Congress enacted

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[1] Specifically, Section 106(b) provides: "[a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." *Id.*

this provision in 1978 when it replaced the Bankruptcy Act (which had no express comparable provision) with the Bankruptcy Code.[2] *See* Pub. L. No. 95-598, 92 Stat. 2555 (Nov. 6, 1978).

The conflict in authority asserted in the petition is illusory. Section 106(b) reflects the longstanding principle, recently reaffirmed by a unanimous Court, that a State's voluntary invocation of the jurisdiction of the federal courts waives its sovereign immunity. *See Lapides v. Board of Regents of the Univ. Sys. of Ga.*, 535 U.S. ___, 122 S. Ct. 1640, 1643-44 (2002) (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); and *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 n.3 (1999)). The decision below reflects a correct and non-controversial application of that principle.

STATEMENT

1. In 1984, Arecibo Community Health Care, Inc. ("Arecibo") entered into a series of hospital administration contracts with the Puerto Rico Department of Health and the Administration of Health Facilities — both instrumentalities of the Commonwealth of Puerto Rico (collectively, "Puerto Rico"). (Pet. App. 3.) On June 30, 1991, Puerto Rico filed a breach of contract action in the Superior Court of Puerto Rico against Arecibo, arising out of the 1984 contracts. (*Id.*) On July 2, 1991, Arecibo filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court, District of Puerto Rico. (*Id.*) The case was converted to a Chapter 7 liquidation proceeding on February 14, 1994, and Carlos E.

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[2] As originally enacted, the pertinent language was codified in Section 106(a) in slightly, but not materially, different form. When Congress enacted the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, it recodified that provision as Section 106(b).

Rodríguez-Quesada was appointed the Chapter 7 Trustee. (*Id.*)

Puerto Rico filed a proof of an unsecured claim in the bankruptcy case for $1,650,449.16, for amounts it contended Arecibo owed to it under the 1984 contracts. (*Id.*) Based on the results of an independent audit of the parties' obligations under those contracts, the Trustee contended that not only did the estate not owe any debt to the Commonwealth, but that in fact, the Commonwealth owed the estate substantial sums under those same contracts. Accordingly, the Trustee objected to the Commonwealth's proof of claim and initiated an adversary proceeding in the bankruptcy court against Puerto Rico on December 29, 1995, seeking $ 8,204,494.48 in damages, plus interest, costs, and attorneys' fees. (*Id.* at 3-4.)

2. The bankruptcy court granted the Commonwealth's motion to dismiss the adversary proceeding based on the Eleventh Amendment, holding that Section 106(b) amounts to an abrogation of sovereign immunity, and is therefore unconstitutional in light of this Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). (Pet. App. 71.) The bankruptcy court further held that Puerto Rico did not, by filing a proof of claim, waive its sovereign immunity with respect to Arecibo's mandatory counterclaim. (*Id.* at 75.) In reaching the latter conclusion, the bankruptcy court adopted a narrow reading of this Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947), and held that the waiver of sovereign immunity effected by the filing of a proof of claim extends only to a debtor's counterclaims that would offset, but not exceed, the amount of the State's affirmative claim against the debtor. (*Id.*)

On appeal, the district court rejected the bankruptcy court's conclusion that Section 106(b) constitutes an unconstitutional abrogation of Eleventh Amendment immunity and concluded, instead, that Section 106(b) is a "valid waiver provision" that is "premise[d] . . . upon an

affirmative action by the state to take advantage of, and participate in, the bankruptcy process." (*Id.* at 48-49.) While Puerto Rico's request for rehearing was pending in the district court, this Court decided *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), which, while rejecting the doctrine of "constructive waiver" of sovereign immunity, specifically reaffirmed the validity of the waiver in *Gardner* based on voluntary invocation of the jurisdiction of the federal courts. *See id.* at 681 n.3.

On Puerto Rico's interlocutory appeal, the First Circuit initially held that Section 106(b) violated the Eleventh Amendment in light of *College Savings*' rejection of "constructive waiver." Asserting that "this is not 'a case in which the State has affirmatively invoked [a federal court's] jurisdiction,'" (Pet. App. 30 (quoting *College Savings*, 527 U.S. at 675)), the First Circuit concluded that it could not discern "any principled reason" for distinguishing waiver premised on the filing of a proof of claim from "constructive waiver" premised on a State's engaging in otherwise lawful commercial activity. (*Id.* at 30.)

Both Arecibo and the United States (which intervened after the First Circuit's original panel decision to defend the constitutionality of Section 106(b)) sought rehearing, arguing that in invalidating Section 106(b), the First Circuit created a split with every other court of appeals to have considered the question. The panel agreed to rehear the case.

3. On rehearing, the panel reversed itself, upholding the validity of Section 106(b) and concluding that its earlier decision "misinterpreted" this Court's decision in *College Savings*. (Pet. App. 2.) After observing generally that "a state may waive its immunity through its affirmative conduct in litigation" (*id.* at 12), the First Circuit cited to *Gardner*'s statement that "[w]hen the State becomes the actor and files a claim against the fund, it waives any immunity which it otherwise might have had respecting the adjudication of the

claim." (*Id.* at 13 (quoting *Gardner*, 329 U.S. at 574).) The court then noted that because *Gardner* did not involve a counterclaim seeking affirmative recovery from the State, it *could* have been read not to have implicated the Eleventh Amendment at all, *but* that such a narrow reading of *Gardner* was precluded by this Court's decision in *College Savings*, which described *Gardner* as standing "for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts." (*Id.* at 13 & n.11 (quoting *College Savings*, 527 U.S. at 681 n.3).) In addition, the First Circuit further explained that Section 106(b) does not rely upon the sort of "constructive waiver" rejected in *College Savings* because "calling upon a federal court's jurisdiction is fundamentally different, for purposes of the Eleventh Amendment, from merely conducting commercial activity." (*Id.* at 14-15.) Further, the court recognized that "[n]othing in *College Savings* purports to restrict the constitutionally permissible scope of waiver triggered by the state's invocation of the jurisdiction of a federal court," and that "[i]f anything, *College Savings* affirms and reinforces" the permissibility of a waiver that — like that contemplated by Section 106(b) — may extend to affirmative recoveries against the State on mandatory counterclaims in a bankruptcy case. (*Id.* at 17-18.) The First Circuit accordingly joined the Tenth, Fourth, and Second Circuits in upholding the constitutionality of Section 106(b). (*Id.* at 19-20 (citing *In re Straight*, 143 F.3d 1387 (10th Cir. 1998); *In re Creative Goldsmiths*, 119 F.3d 1140 (4th Cir. 1997); and *In re 995 Fifth Avenue Assoc., L.P.*, 963 F.2d 503 (2d Cir. 1995).)

By order dated January 14, 2002, the First Circuit denied the Commonwealth's petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Further review of the First Circuit's decision on rehearing in this case is unwarranted. The courts of appeals unanimously have upheld Section 106(b) of the Bankruptcy Code against the Eleventh Amendment challenge brought here. Thus, no circuit split exists on the question presented. The cases on which Petitioners rely in suggesting the existence of a split predate Section 106(b) and stood only for the proposition that in the absence of legislation providing otherwise, the waiver of sovereign immunity effected by filing a proof of claim was limited to setting off against the asserted claim. The decision below reflects a proper and non-controversial application of settled Eleventh Amendment principles, as articulated in *Gardner* and *College Savings* (and since reaffirmed by *Lapides*).[3]

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[3] In addition, it is far from clear that the question whether Section 106(b) violates the Eleventh Amendment is properly presented in this case. Puerto Rico is not a State. Accordingly, it does not enjoy the same constitutionally-protected immunity that is an "attribute[] of [the] sovereignty" that the "States of the Union" retain under the Constitution. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934). Rather, in light of Congress' broad authority to govern the affairs of Puerto Rico, U.S. Const. art. IV, § 3, whatever sovereign immunity Puerto Rico may enjoy exists as a non-constitutional matter of common law, subject to Congress' power to modify or abrogate it. The question presented in this case is premised on Congress' inability to abrogate States' sovereign immunity when acting pursuant to its Article I powers. Because Congress does possess the power to abrogate Puerto Rico's sovereign immunity, the decision below could be affirmed without deciding the question alleged to be presented here. Although the First Circuit has determined that Congress should be presumed to treat Puerto Rico as a State absent clear legislative intent to the contrary, *see Mercado v. Puerto Rico*, 214 F.3d 34, 42-43 (1st Cir. 2000), the Bankruptcy Code's requirement that every "State, Commonwealth, Territory . . . or instrumentality of the United States" waive immunity as a condition of its

I. PETITIONERS' CLAIMS OF A CIRCUIT SPLIT ARE ILLUSORY.

This Court consistently has recognized the "unremarkable proposition," *College Savings*, 527 U.S. at 675, that a State waives its sovereign immunity through affirmative litigation conduct that invokes the jurisdiction of the federal courts, such as filing a proof of claim in a bankruptcy case, *see Gardner*, 329 U.S. at 574, or consenting to removal of a case from state to federal court, *see Lapides*, 122 S. Ct. 1640. In enacting Section 106(b), Congress effectively codified a limited version of this principle, providing that a State waives its sovereign immunity as to compulsory counterclaims by filing a proof of claim in a bankruptcy case. Because the cases to which Petitioners point to illustrate the asserted circuit split did *not* involve Section 106(b), and because every court of appeals decision addressing the constitutionality of § 106(b) has upheld its validity, no circuit split exists on the question presented.

A. This Court's Settled Precedent Makes Clear That Voluntary Invocation of the Jurisdiction of the Federal Courts Effects a Valid Waiver of Sovereign Immunity.

The original Bankruptcy Act of 1898 was silent as to whether the filing of a proof of claim constituted a waiver of sovereign immunity. Against that background, this Court considered in *Gardner* whether the State of New Jersey had waived its sovereign immunity by filing a proof of claim in a bankruptcy case, seeking recovery of back taxes from the debtor's estate. In concluding that it had, this Court stated that "[w]hen the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise

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filing a proof of claim, 11 U.S.C. §§ 101(27), 106(b), makes clear Congress' intent to require Puerto Rico's waiver here.

might have had respecting the adjudication of the claim." 329 U.S. at 574. It is true, as Petitioners point out (Pet. 13), that the debtor in *Gardner* did not file a "counterclaim" seeking affirmative recovery from the State, and so *Gardner* could conceivably have been decided more narrowly — either on the ground that the Eleventh Amendment is not implicated at all, because the debtor's objections to the proof of claim are merely defenses and therefore do not constitute a suit against the State, or on the related ground that the waiver is only effective up to setoff.[4] However, the opinion in *Gardner* expressly states that the filing of a proof of claim effected a *waiver* of sovereign immunity. 329 U.S. at 574.

In recent cases, this Court consistently has repeated and reaffirmed that reading of *Gardner*. In *College Savings*, for example, this Court described *Gardner* as standing for the "unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts."[5] 527 U.S. at 681 n.3. Likewise, as this

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[4] At common law, the waiver of sovereign immunity effected by the voluntary participation of the United States or an Indian Nation in litigation extended only to setoff and did not permit affirmative recovery from the governmental unit claiming immunity. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940). For the reasons explained by this Court in *Lapides* and described below, *see infra* at 13-14, this principle cannot seamlessly be transplanted to the immunity reflected in the Eleventh Amendment, "a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government," 122 S. Ct. at 1646.

[5] One year earlier, in his concurrence in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381 (1998), Justice Kennedy also recognized that in *Gardner*, this Court "found a waiver of the Eleventh Amendment when a State voluntarily appeared in bankruptcy court to file a claim against a common fund." *Id.* at 395 (Kennedy, J., concurring). Presaging this Court's recent holding in *Lapides*, Justice Kennedy drew upon the "voluntary appearance as waiver" principle of *Gardner* to conclude that when a State named as a defendant in state court consents

Court stated in its unanimous decision in *Lapides*, "[t]he Court has long accepted" the "general legal principle" that voluntary invocation of federal court jurisdiction effects a waiver of sovereign immunity. *See* 122 S. Ct. at 1644. Indeed, this Court recognized in *Lapides* that, despite the fact — upon which Petitioners rely (Pet. 9, 13) — that "the cases that stand for [that] principle . . . did not involve suits for money damages against the State . . . the principle enunciated in those cases did not turn upon the nature of the relief sought . . . and remains sound as applied to suits for money damages." 122 S. Ct. at 1643. Thus, the treatment of *Gardner* in *College Savings* and *Lapides* makes clear that the affirmative act of invoking the jurisdiction of the federal courts constitutes a waiver of Eleventh Amendment immunity and permits affirmative recovery against the States.

B. Petitioners' Claimed "Circuit Split" Ignores Congress' Enactment of Section 106(b).

The crux of Petitioners' argument is that the circuits are split as to whether filing a proof of claim in a bankruptcy case constitutes a valid waiver of a State's sovereign immunity as to compulsory counterclaims. There is no such split. The central flaw in Petitioners' argument is that it disregards the effect of Section 106(b). The question presented is not whether, in the absence of any legislative direction, voluntary invocation of federal court authority *ought* to operate as a waiver of sovereign immunity. Pursuant to its power to "establish . . . uniform Laws on the subject of Bankruptcies through the United States," U.S. Const. art. I, § 8, cl. 4, Congress has provided a clear and

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to removal of the case to federal court, its action "may well be regarded as voluntary in the same manner as the appearance[] which gave rise to the waiver[] in . . . *Gardner*." *Id.* at 396.

affirmative answer to that question.[6] The question, then, is whether the Eleventh Amendment restricts Congress' authority to make that choice. The courts of appeals that have considered *that* question have held unanimously that Section 106(b) is a valid exercise of Congress' authority.

The cases Petitioners point to as evidence of a "split" are decisions of the Sixth and Seventh Circuits that arose *prior to* the applicability of Section 106(b).[7] (*See* Pet. 13-14 (discussing *In re Friendship Medical Center, Ltd.*, 710 F.2d 1297 (7th Cir. 1983) and *Ohio v. Madeline Marie Nursing Homes Number One and Number Two*, 694 F.2d 449 (6th Cir. 1982).) Because those cases do not address the constitutionality of Section 106(b) — the question presented here — they cannot possibly create a split of authority that warrants this Court's review.

In *Ohio v. Madeline Marie Nursing Homes Number One and Number Two*, 694 F.2d 449 (6th Cir. 1982), the Sixth Circuit concluded, without addressing the *Gardner* line of authority, that Ohio had not waived sovereign immunity by filing a proof of claim in a bankruptcy proceeding because "the Bankruptcy Act of 1898 does not require waiver of sovereign immunity as a condition to the filing of a claim." *Id.* at 462. Similarly, in *In re Friendship Medical Center,*

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[6] When Congress enacted the Bankruptcy Code and added Section 106, it certainly intended to permit affirmative recovery against a State that filed a proof of claim in a bankruptcy action. According to the House Judiciary Committee, the "governmental unit cannot receive distribution from the estate without subjecting itself to any liability it has to the estate within the confines of the compulsory counterclaim rule. Any other result would be one-sided. The counterclaim by the estate against the governmental unit is without limit." H.R. Rep. No. 95-595 (1977). The Committee went on to say that "[s]ubsection (a) governs affirmative recovery." *Id.*

[7] The 1978 Bankruptcy Code applies to bankruptcy cases filed on or after October 1, 1979. *See* Act of Nov. 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549. *See Brown v. Felsen*, 442 U.S. 127, 129 n.1 (1979).

Ltd., 710 F.2d 1297 (7th Cir. 1983), the Seventh Circuit turned to common law waiver doctrine because no statutory waiver yet existed. In determining whether filing a proof of claim constituted waiver, the Seventh Circuit read *Gardner* to stand for the narrow proposition — not the one articulated by this Court in *College Savings* or *Lapides* — that filing a proof of claim waives sovereign immunity only "to the extent necessary" to adjudicate the State's claim and not to permit affirmative recoveries against the State. *Id.* at 1300.

In enacting Section 106(b), however, Congress chose to codify a broader reading of *Gardner*, which provides that when a State invokes the jurisdiction of the bankruptcy court by filing a proof of claim, it thereby waives its sovereign immunity with respect to counterclaims that arise out of the same transaction or occurrence.[8] Accordingly, contrary to Petitioners' contention (Pet. 12-17), neither of these cases provides any evidence of a split in authority on the question presented here.

C. Every Court of Appeals That Has Considered the Question Has Upheld the Constitutionality of Section 106(b).

Petitioners do not (and cannot) point to any decision of a court of appeals concluding that the particular waiver contemplated in Section 106(b) violates the Eleventh Amendment. Had the original decision of the panel of the First Circuit in this case stood, it would have been the first to so hold and would have created a fresh split of authority. In light of the panel's reversal of its decision, however, the

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[8] It is worth noting that the result the Seventh Circuit reached in *In re Friendship* would obtain under Section 106(b) as well because the claims asserted against the State in *In re Friendship* "were completely unrelated" to the claim upon which the State had filed its proof of claim. *See* 710 F.2d at 1300.

courts of appeals remain unanimous in upholding Section 106(b) against the constitutional challenge presented here.

The Tenth, Fourth, and Second Circuits all have reached the same result as the First Circuit below. In *In re Straight*, 143 F.3d 1387 (10th Cir. 1998), for example, the Tenth Circuit concluded that in providing for the Section 106(b) waiver, Congress "follow[ed] the lead," *id.* at 1392, of this Court's decision in *Gardner* and "codifie[d] the *Gardner* rule but narrow[ed] its applicability" to claims arising out of the "same transaction or occurrence" as the claim asserted by the State, *id.* at 1390. Accordingly, the Tenth Circuit affirmed "the ability of Congress to draw the equitable line across which the state has the option to cross."[9] *Id.* at 1392; *see also In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1148 (4th Cir. 1997) (holding that "to the extent a defendant's assertions . . . with regard to a state-filed proof of claim in a bankruptcy action, amount to a *compulsory* counterclaim, a state has waived any Eleventh Amendment immunity against that counterclaim in order to avail itself of the federal forum"); *In re 995 Fifth Avenue Assocs., L.P.*, 963 F.2d 503, 508 (2d Cir. 1992) (concluding that former Section 106(a) — materially identical to current Section 106(b) — "largely partakes of the waiver by participation doctrine that received [this Court's] imprimatur in *Gardner*").

II. THE DECISION OF THE FIRST CIRCUIT BELOW IS CORRECT.

The Court of Appeals correctly held that Section 106(b) is a permissible exercise of Congress' authority to condition waiver of sovereign immunity on a State's decision to invoke

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[9] *See also In re Innes*, 184 F.3d 1275, 1280 (10th Cir. 1999) (citing *In re Straight* with approval in analyzing Eleventh Amendment issues under *College Savings*).

the jurisdiction of the federal courts. Petitioners make two main arguments to the contrary: (1) In cases that did not involve statutory provision for waiver or the Eleventh Amendment, the federal government and Indian Nations were permitted to invoke the court's jurisdiction but to retain their sovereign immunity from claims seeking monetary damages beyond setoff (Pet. 21-23); and (2) Section 106(b) is an impermissible "constructive waiver" because filing a proof of claim is not "qualitatively different from the activities dealt with in *College Savings*" (*id.* at 24). Both arguments are foreclosed by an unbroken line of authority — culminating in this Court's recent unanimous decision in *Lapides* — that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts.

First, in holding unanimously in *Lapides* that a State's removal of a case from state to federal court waives its Eleventh Amendment immunity, this Court reaffirmed the well-established proposition that "a State's voluntary appearance in federal court amount[s] to a waiver of its Eleventh Amendment immunity." 122 S. Ct. at 1643; *see also Clark v. Barnard*, 108 U.S. 436, 447 (1883) (concluding that "the voluntary appearance of the state in intervening as a claimant of the fund in court" constitutes a waiver of Eleventh Amendment immunity through "voluntary submission to [the court's] jurisdiction"); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906) (observing that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it . . . cannot escape the result of its own voluntary act by invoking the prohibition of the Eleventh Amendment"). This Court expressly relied on *Gardner* in support of that "general principle" of waiver, *Lapides*, 122 S. Ct. at 1641, reading it to have "held" that "'a State waives any immunity . . . respecting the adjudication of' a 'claim' that it voluntarily files in federal court." *Id.* at 1644 (quoting *Gardner*, 329 U.S. at 574). And, contrary to Petitioners' attempt to minimize what they describe as "a casual reference to

Gardner in *College Savings*" (Pet. 22), *Lapides* treats the discussion of *Gardner* in *College Savings* as evidence of this Court's "long accept[ance of] this statement of the law as [illegible]," 122 S. Ct. at 1644.

Petitioners' reliance on *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), and *United States v. Shaw*, 309 U.S. 495 (1940), as articulating a controlling and contrary rule that "limits the scope of allowable counterclaims against a sovereign" (Pet. 21) is misplaced. In *Lapides*, this Court rejected Georgia's attempt to make a similar argument, concluding that those cases were inapposite to the specific Eleventh Amendment question presented because "[t]hose cases . . . do not involve the Eleventh Amendment — a specific text with a history that focuses upon the State's sovereignty vis-à-vis the Federal Government." *Id.* at 1646. Moreover, those cases were decided before *Gardner* and, as this Court noted, depended on "special circumstances" that do not apply here, *id.*, including lack of "statutory authority" for waiver and the "unusual governmental organization and peculiar problems" associated with Indian Nations. *United States Fidelity & Guar. Co.*, 309 U.S. at 512, 513. Accordingly, given the inapplicability of these cases and the clear, controlling precedent that voluntary appearance in a federal court constitutes a waiver of Eleventh Amendment immunity, the decision of the First Circuit is correct.

Second, despite Petitioners' contention otherwise, *College Savings* is entirely consistent with the proposition that Congress can condition affirmative access to the federal courts on the kind of waiver of sovereign immunity provided for by Section 106(b). While rejecting the broad theory of "constructive waiver" — under which Congress sought to condition waiver of sovereign immunity on a State's decision to engage in ordinary and otherwise lawful commercial activity — this Court in *College Savings* made a point of distinguishing and ratifying the validity of the waiver it had found in *Gardner*, which arose out of a State's affirmative

litigation conduct. 527 U.S. at 681 n.3 (stating that *Gardner* "stands for the unremarkable proposition that a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts"). Subsequently, in *Lapides*, this Court explicitly recognized that in *College Savings* it had "distinguished the kind of constructive waivers repudiated there from waivers effected by litigation conduct." *Lapides*, 122 S. Ct. at 1644. Thus, under *College Savings*, Congress may condition waiver on certain actions taken by States, but not others. The activity New Jersey undertook in *Gardner*, invoking the jurisdiction of the federal courts, has long been held to constitute a valid waiver of sovereign immunity. Accordingly, Puerto Rico's decision to file a proof of claim in the Arecibo bankruptcy, in the face of the clear requirement of Section 106(b), is far more like South Dakota's decision to accept federal highway funds, *see South Dakota v. Dole*, 483 U.S. 203 (1987) (cited with approval in *College Savings*, 527 U.S. at 686-87), than it is like Florida's decision to advertise its college tuition savings program, *see College Savings*, 527 U.S. at 691.[10]

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[10] The fact that this Court has held that the act of filing a proof of claim in a bankruptcy proceeding constitutes a valid waiver of other constitutional rights provides further support for the First Circuit's decision in this case. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (per curiam) (holding that a creditor's filing of a proof of claim constitutes a waiver of the Seventh Amendment right to jury trial of related preference actions brought by a debtor because that act subjects the creditor to "the bankruptcy court's equitable power" to effect "the restructuring of the debtor-creditor relationship"); *see also In re PNP Holdings Corp.*, 99 F.3d 910, 911 (9th Cir. 1996) (per curiam) (holding that the filing of a proof of claim waives an individual's due process right not to be haled into a court with which he or she otherwise would lack minimum contacts); *SEC v. Infinity Group Co.*, 27 F. Supp. 2d 559, 562 (E.D. Pa. 1998) (same). Indeed, to treat sovereign immunity differently from other constitutional rights in this context would be inconsistent with the established proposition that "there is no . . . hierarchy among[] constitutional rights." *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 628 (1989).

Although Petitioners criticize the First Circuit for allegedly failing to articulate the rationale for this distinction (Pet. 24), as this Court recently explained, it "makes sense because an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire." *Lapides*, 122 S. Ct. at 1644. Indeed, "[i]t would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Id.* at 1641.

This is particularly true in the bankruptcy context where cases are "in the nature of an interpleader," *Clark*, 108 U.S. at 448, and the estate's claims against a creditor are "part and parcel of the [claims] allowance process," *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58 (1989). A core principle of bankruptcy is that a creditor's claims against a debtor "cannot be separated" from the debtor's related claims against its creditor because, like two sides of the same coin, they are "not distinct suits . . . but parts of one suit in bankruptcy." *Wiswall v. Campbell*, 93 U.S. 347, 348 (1876); *see also Katchen v. Landy*, 382 U.S. 323, 332 n.9 (1966) (holding that "determination of objections to claims, whether or not affirmative relief is decreed, does not constitute adjudication of a suit by the trustee"). Under such circumstances, if "a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of [bankruptcy law] would be frustrated." *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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